

1 Jefferi Hamilton, SBN 99005
2 Law Offices of Jefferi J. Hamilton
3 Pacific Center I
4 1455 Frazee Road, Suite 801
5 San Diego, CA 92108
6 Telephone: (619) 908-5600
7 Facsimile: (866) 417-1047

8 Attorneys for Defendant, Berkeley Propoerties

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 ROBERT MCCARTHY,

14 Plaintiff,

15 v.

16 BERKELEY LAND ET AL, et al.,

17 Defendants.

Case No. C 07-03462 BZ

**ANSWER OF BERKELEY PROPOERTIES
TO PLAINTIFF'S COMPLAINT**

18 COMES NOW the Defendant, Berkeley Propoerties, and answers the Complaint
19 on file herein as follows:

20 1. In response to paragraph 1, this defendant denies the allegations
21 contained in said paragraph.

22 2. In response to paragraph 2, this defendant does not have sufficient
23 information to admit or deny the allegations contained therein.

24 3. In response to paragraph 3, this defendant does not have sufficient
25 information to admit or deny the allegations contained therein.

26 4. In response to paragraph 4, this defendant does not have sufficient
27 information to admit or deny the allegations contained therein except as to lines 21 to 24
28 and as to those allegations, denies the same.

5. In response to paragraph 5, this defendant does not have sufficient
information to admit or deny the allegations contained therein except that defendant

1 denies generally and specifically that it operates the property at that location.

2 6. In response to paragraph 6, this defendant does not have sufficient
3 information to admit or deny the allegations contained therein.

4 7. In response to paragraph 7, this defendant denies generally and
5 specifically the allegations contained therein.

6 8. In response to paragraph 8, this Defendant denies generally and
7 specifically the allegations contained therein.

8 9. In response to paragraph 9, this defendant does not have sufficient
9 information to admit or deny the allegations contained therein.

10 10. In response to paragraph 10, this defendant does not have sufficient
11 information to admit or deny the allegations contained therein.

12 11. In response to paragraph 11, this defendant does not have sufficient
13 information to admit or deny the allegations contained therein.

14 12. In response to paragraph 12, this defendant does not have sufficient
15 information to admit or deny the allegations contained therein.

16 13. In response to paragraph 13, this defendant does not have sufficient
17 information to admit or deny the allegations contained therein.

18 14. In response to paragraph 14, this defendant does not have sufficient
19 information to admit or deny the allegations contained therein.

20 15. In response to paragraph 15, this defendant does not have sufficient
21 information to admit or deny the allegations contained therein.

22 16. In response to paragraph 16, this defendant does not have sufficient
23 information to admit or deny the allegations contained therein.

24 17. In response to paragraph 17, this defendant does not have sufficient
25 information to admit or deny the allegations contained therein.

26 18. In response to paragraph 18, this defendant does not have sufficient
27 information to admit or deny the allegations contained therein.

28 19. In response to paragraph 19, this defendant does not have sufficient

1 information to admit or deny the allegations contained therein.

2 20. In response to paragraph 20, this defendant does not have sufficient
3 information to admit or deny the allegations contained therein.

4 21. In response to paragraph 21, this defendant does not have sufficient
5 information to admit or deny the allegations contained therein.

6 22. In response to paragraph 22, this defendant does not have sufficient
7 information to admit or deny the allegations contained therein.

8 23. In response to paragraph 23, this defendant does not have sufficient
9 information to admit or deny the allegations contained therein.

10 24. In response to paragraph 24, this defendant does not have sufficient
11 information to admit or deny the allegations contained therein.

12 25. In response to paragraph 25, this defendant does not have sufficient
13 information to admit or deny the allegations contained therein.

14 26. In response to paragraph 26, this defendant does not have sufficient
15 information to admit or deny the allegations contained therein.

16 27. In response to paragraph 27, this defendant does not have sufficient
17 information to admit or deny the allegations contained therein.

18 28. In response to paragraph 28, this defendant does not have sufficient
19 information to admit or deny the allegations contained therein.

20 29. In response to paragraph 29, this defendant does not have sufficient
21 information to admit or deny the allegations contained therein.

22 30. In response to paragraph 30, this defendant does not have sufficient
23 information to admit or deny the allegations contained therein.

24 31. In response to paragraph 31, this defendant does not have sufficient
25 information to admit or deny the allegations contained therein.

26 32. In response to paragraph 32, this defendant does not have sufficient
27 information to admit or deny the allegations contained therein.

28 33. In response to paragraph 33, this defendant does not have sufficient

1 information to admit or deny the allegations contained therein.

2 34. In response to paragraph 34, this defendant does not have sufficient
3 information to admit or deny the allegations contained therein.

4 35. In response to paragraph 35, this defendant does not have sufficient
5 information to admit or deny the allegations contained therein.

6 36. In response to paragraph 36, this defendant does not have sufficient
7 information to admit or deny the allegations contained therein.

8 37. In response to paragraph 37, this defendant does not have sufficient
9 information to admit or deny the allegations contained therein.

10 38. In response to paragraph 38, this defendant does not have sufficient
11 information to admit or deny the allegations contained therein.

12 39. In response to paragraph 39, this defendant does not have sufficient
13 information to admit or deny the allegations contained therein.

14 40. In response to paragraph 40, this defendant does not have sufficient
15 information to admit or deny the allegations contained therein.

16 41. In response to paragraph 41, this defendant does not have sufficient
17 information to admit or deny the allegations contained therein.

18 42. In response to paragraph 42, this defendant does not have sufficient
19 information to admit or deny the allegations contained therein.

20 **(NO CAUSE OF ACTION)**

21 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that
22 Plaintiff's Complaint and each alleged cause of action therein, fails to state facts
23 sufficient to constitute a cause of action as to this answering Defendant.

24 **(COMPARATIVE NEGLIGENCE OF PLAINTIFF)**

25 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that at
26 the times and places mentioned in Plaintiff's Complaint, Plaintiff was careless, reckless
27 and negligent in and about the matters and things alleged in Plaintiff's Complaint, which
28 said carelessness, recklessness and negligence concurred in point of time with the

1 alleged negligence of the Defendant, if any there may have been, and proximately
2 caused and contributed to whatever injury and/or damage Plaintiff may have sustained, if
3 any, and recovery by the Plaintiff, if any, should be proportionately reduced according to
4 the percentage of fault of the Plaintiff.

5 **(COMPARATIVE NEGLIGENCE OF THIRD PARTIES)**

6 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that in
7 addition to the aforementioned negligence of the Plaintiff, any damages incurred by the
8 Plaintiff were directly and proximately caused and contributed to by the negligence of
9 third persons.

10 **(ASSUMPTION OF THE RISK)**

11 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that
12 Plaintiff did with full knowledge of the consequences of its acts, and with full knowledge
13 of the dangers incident thereto, voluntarily exposed its to all of the matters and things
14 alleged in the Complaint and did thereby assume the risk generally incident thereto.

15 **(NO PUNITIVE DAMAGE CLAIM)**

16 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant allege that
17 punitive damages are violative of the due process, equal protection and right of privacy
18 provisions of the United States and California State Constitutions and that this Court,
19 therefore, does not have subject matter jurisdiction to hear the punitive damage claim.

20 **(WILLFUL MISCONDUCT BY PLAINTIFF)**

21 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that at
22 the times and places mentioned in Plaintiff's Complaint, Plaintiff did commit willful
23 misconduct in and about the matters and things alleged in Plaintiff's Complaint, which
24 said willful misconduct concurred in point of time with the alleged willful misconduct of
25 the Defendant, if any there may have been, and proximately caused and contributed to
26 whatever injury and/or damage Plaintiff may have sustained, if any.

27 **(UNAVOIDABLE INCIDENT)**

28 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that

1 the events, injuries, losses and damages complained of in Plaintiff's Complaint, if any
2 there were, were the result of an unavoidable accident insofar as these answering
3 Defendant is concerned and occurred without any negligence, want of care, default or
4 other breach of duty to Plaintiff on the part of said Defendant.

5 **(STATUTE OF LIMITATIONS)**

6 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that
7 the cause of action stated in Plaintiff's Complaint herein is barred by Code of Civil
8 Procedure sections 335.1, 337, 337.1, 337.15, 338, 339, 340 and 343 or other sections
9 which may be deemed applicable.

10 **(SET-OFF OF DAMAGES)**

11 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that a
12 set-off exists for monies incurred by this answering Defendant and paid to Plaintiff. This
13 Answer will be amended when said sums are ascertained to plead the correct amounts.

14 **(MITIGATION OF DAMAGES)**

15 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that it
16 is informed and believes and upon such information and belief alleges that Plaintiff, by
17 the exercise of reasonable effort and/or care, could have mitigated the amount of
18 damages alleged to have suffered, but Plaintiff has failed, neglected and refused, and
19 continues to fail and refuse, to exercise a reasonable effort to mitigate the damages.

20 **(CIVIL CODE SECTION 1431.1)**

21 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that
22 pursuant to Civil Code section 1431.1 *et. seq.* that if this Defendant is held liable for
23 damages to Plaintiff or to any other party in any amount, that this Defendant is only
24 severally liable in an amount equal to its proportional share of liability for any non-
25 economic damages allegedly suffered by the Plaintiff or any other party.

26 ///

27 **(ESTOPPEL AND WAIVER)**

28 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that

1 Plaintiff's claim is barred by the doctrines of estoppel and waiver.

2 **(LACHES AND ESTOPPEL)**

3 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that
4 Plaintiff's claim is barred by the doctrines of laches and estoppel.

5 **(TRIVIAL DEFECT)**

6 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that
7 the action is barred because the condition of the property which allegedly resulted in the
8 injury claimed by the plaintiff creates a minor, trivial, and/or insignificant risk of injury.

9 **(OPEN AND OBVIOUS)**

10 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that
11 the action is barred because the condition of the property which allegedly resulted in the
12 injury claimed by the plaintiff was open and obvious.

13 **(PRE-CODE CONSTRUCTION, MODIFICATION)**

14 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that IT
15 is not obligated to remove the barriers alleged in the Complaint to the extent that the
16 structures at issue were constructed and/or modified before the effective date of any law
17 or regulation prohibiting the existence of any such alleged barrier.

18 **(NO STATUTORY OBLIGATION)**

19 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that it
20 is excused from having made, or making, any of the changes referenced in the
21 Complaint because the laws in question excuse performance under these
22 circumstances.

23 **(SUBSTANTIAL COMPLIANCE)**

24 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that
25 Plaintiff is not entitled to recover on the claim for relief in this action because Defendant
26 has completely or substantially complied with all applicable requirements.

27 **(NO INJURY IN FACT)**

28 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that

1 Plaintiffs claims are barred on the ground and to the extent that Plaintiff has suffered no
2 injury in fact with respect to the facts alleged in the Complaint.

3 **(NO INTENTIONAL DISCRIMINATION — CAL. CIV. CODE 51)**

4 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that
5 Plaintiff is not entitled to recover on the claims for relief in the Complaint because
6 Defendant has not engaged in any intentional discrimination.

7 **(NO DAMAGES — CAL. CIV. CODE § 52, 54.3(a))**

8 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that
9 Plaintiff is not entitled to recover the damages sought in he Complaint because Plaintiff's
10 admittance to and enjoyment of the facility in question was not denied or interfered with
11 by this responding party.

12 **(NO DUPLICATIVE DAMAGES — CAL. CIV. CODE § 54i(c))**

13 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that
14 Plaintiff is not entitled to recover damages under both section 52 and Section 54.3 of the
15 California Civil Code for the same act or failure to act.

16 **(FAILURE TO DISCHARGE CONDITIONS PRECEDENT)**

17 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that
18 Plaintiff is not entitled to bring and/or recover on this act on in that he has failed to
19 discharge each of the conditions precedent to suit, including, without limitation, a failure
20 to exhaust available administrative remedies.

21 **(MOOT)**

22 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that
23 Plaintiffs prayer for injunctive relief is moot and/or will be by the time this matter is
24 adjudicated.

25 **(UNCLEAN HANDS)**

26 FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that
27 the Complaint, and each purported claim for relief alleged therein is barred by the
28 doctrine of unclean hands by reason of Plaintiffs conduct

(NO RIGHT TO ATTORNEYS' FEES)

FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that Plaintiff is not entitled to recover attorneys' fees and costs and is barred on the grounds that they were unreasonably incurred, Plaintiff is not a prevailing party and they were incurred at an excessive rate.

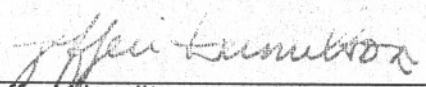
(TEMPORARY BARRIERS)

FOR A SEPARATE AND DISTINCT DEFENSE, this answering Defendant alleges that to the extent that there were any barriers to access at the subject facility, such barriers were temporary in nature and did not constitute or support a violation of any of the laws under which Plaintiff purports to sue.

WHEREFORE, this answering Defendant prays that Plaintiff take nothing by way of its Complaint and this Defendant goes hence with its attorneys fees and costs of suit incurred.

Dated: 9/7/07

Law Offices of Jefferi J. Hamilton



Jefferi Hamilton
Attorney for Defendant,
Berkeley Land Company, Inc.

PROOF OF SERVICE BY MAIL

Robert McCarthy v. Berkeley Land et al
U.S. District Court North Court; Case No. C 07-03462 BZ

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to the within action; my business address is 1455 Frazee Road, Suite 801, San Diego, California 92108.

On the date executed below, I served the document(s) described as:

ANSWER OF BERKELEY PROPERTIES TO PLAINTIFF'S COMPLAINT

on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at San Diego, California 92108, addressed as follows:

David C. Wakefield, Esq.
Pinnock & Wakefield
3033 Fifth Avenue, Suite 410
San Diego, CA 92103

Attorneys for Plaintiff, Robert McCarthy
Tele: 619-858-3671
Fax: 619-858-3646

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepared at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed on 9/7/07, at San Diego, California.


Bernadette Rouilliar